**PERWIRA HABIB BANK (M) BHD.**

**v.**

**SAIYO SDN. BHD. & ORS.**

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C23-2484-86]
21 NOVEMBER 1990

***CONTRACT:*** *Guarantee - Whether continuing - Jointly and severally - Whether past consideration - Whether variation - Construction of guarantee documents - Contracts Act 1950, s. 80(c)*

The 1st defendant D1 obtained a term loan of RM2 million from the plaintiff bank and by a letter of guarantee dated 7 September 1983, the 2nd and 3rd defendants, D2 and D3, jointly and severally guaranteed all payments due to the plaintiff from D1.

The plaintiff claimed that D1 was in default of payments and that the three defendants failed to heed the letters of demand sent to them. The plaintiff was granted final judgment against D2 and D3. This was the appeal by D2 and D3 against the said judgment, arguing firstly that there was past consideration as the letter of guarantee was executed after the term loan was dismissed and secondly, that there was a variation in the terms of the loan agreement.

**Held:**

**[1]** Following the decision in *Heng Chung Swee*, and in reading the preamble to, and Clause 4, of the contract of guarantee, the guarantee in the present case is a continuing guarantee as the guarantee was executed in consideration of the plaintiff making or continuing advances or otherwise giving or continuing credit or banking facilities.

**[2]** Although the term loan was disbursed before the letter of guarantee was executed, it is evident from the terms of the letter of guarantee that there was good consideration in this case. The illustration referred to in s. 80(c) of the Contracts Act 1950 does not apply to this case as the situation here is different from that envisaged in that section.

**[3]** There is no merit to the contention as regards the variation of the agreement as D2 and D3 had expressly agreed to the stipulation in Clause 5 of the guarantee that the plaintiff may vary the terms of the loan agreement.

*[D2 and D3's appeal dismissed with costs.]*

**Cases referred to:**
*Chew Soon Tat v. Malaysian National Insurance [1977] 1 MLJ 241* ***(cit)***
*Citibank N.A. v. Ooi Boon Leong [1981] 1 MLJ 282* ***(foll)***
*Heng Chung Swee v. Bangkok Bank Ltd. [1976] 1 MLJ 167* ***(foll)***

**Legislation referred to:**
Contracts Act 1950, s. 80

*For the respondent/plaintiff - John Mathew; M/s. Shook Lin & Bok*
*For the 2nd & 3rd defendants/applicants - W. Peters; M/s. Mun & Co.*

**JUDGMENT**

**Zakaria Yatim J:**

This is an appeal by the second and third defendants against the decision of the Senior Assistant Registrar, who ordered that the plaintiff be at liberty to sign final judgment against the second and third defendants.

The plaintiff is a bank. The first defendant is a private limited company incorporated in Malaysia. At all material times it was a customer of the plaintiff. The first defendant obtained a term loan from the plaintiff for the sum of RM2 million, which was disbursed by the plaintiff to the first defendant in December 1982. By a letter of guarantee dated 7 September 1983, the second and third defendants jointly and severally agreed to guarantee the repayment, on demand, all monies due to the plaintiff from the first defendant arising from the banking facilities granted to the first defendant. According to the statement of claim, the plaintiff had made advances to be the first defendant on its term loan account. The plaintiff claims that the amount due and owing as at 30 June 1986 was RM2,688,809.27 with interest at the rate of 3.5% above the plaintiff's base lending rate from 1 July 1986 to the date of full payment. Letters of demand were sent to the three defendants demanding payment for the said sum with interest but the defendants failed to pay the amount claimed.

Mr. W. Peters, Counsel for the second and third defendants raised only two points in this appeal. The first point was that there was past consideration. Secondly, he said, there was a variation in the terms of the loan agreement.

On the question of past consideration, Mr. Peters said that the letter of guarantee was executed after the term loan was disbursed. He referred to s. 80 illustration (c) of the Contracts Act 1950. Illustration (c) states:

> A sells and delivers goods to B. B afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

Mr. Peters also cited *Chew Soon Tat v. Malaysian National Insurance* [1977] 1 MLJ 241. In that case it was decided that a guarantor would only be liable for debts or liabilities incurred after the date of the guarantee.

In considering this point, it is necessary to look at the letter of guarantee itself. It is not in dispute that the second and third defendants executed the letter of guarantee on 7 September 1983. The preamble to the letter of guarantee states:

> In consideration of your making or continuing advances or otherwise giving or continuing credit or banking facilities (including the issue of guarantee by you) to Saiyo Sdn. Bhd. hereinafter called the principal, I/We jointly and severally guarantee to you due repayment, within two days after demand, of all moneys which shall at any time be due to you from the principal, in any shape or form, together with interest, charges, commission, costs, etc., provided that the total amount recoverable from me/us jointly and severally under this guarantee shall not at any time exceed the principal sum of RM2,000,000 (ringgit two million only) exclusive of interest and charges.

It will be noted that the second and third defendants executed the letter of guarantee in consideration of the plaintiff "making or continuing advances or otherwise giving or continuing credit or banking facilities ..." Clause 2 of the letter of guarantee also states that the "... guarantee shall be a continuing security binding on ... us ..."

Mr. John Mathew, Counsel for the plaintiff submitted that the guarantee was a continuing guarantee. In *Heng Chung Swee v. Bangkok Bank Ltd.* [1976] 1 MLJ 167, the Federal Court was considering a letter of guarantee the preamble of which was similar to that in the present

case. Clause 4 of the letter of guarantee in that case is similar to Clause 2 of the letter of guarantee in the present case. Both the preamble and Clause 4 of the letter of guarantee in that case are stated in the judgment and I shall quote them below:

> On behalf of the bank it is argued by Mr. O.C. Lim before us that its claim should be decided simply on the terms of the letter of guarantee. Its preamble reads as follows (omitting irrelevant words).
>
> > In consideration of [the bank] making or continuing advances for as long as the bank may think fit to [the company], I [the defendant] hereby agree to pay to the bank on demand all sums of money which are now or shall at any time be owing to the bank from the company ...

Clause 4 of the letter of guarantee reads:

> This guarantee shall be a continuing guarantee and shall be in full force until three calendar months after [notice given by the defendant as specified in the clause] ...

Having stated the above, the Federal Court decided that the guarantee was a continuing guarantee. At p. 271, the Federal Court said:

> The defendant has signed a continuing guarantee, **guaranteeing** (*sic*) the overdraft existing at the time when he signed the letter of guarantee as well as the overdraft to be made in the future.

Having considered the *Heng Chung Swee's* case, I am satisfied that the guarantee in the present case is a continuing guarantee. Although the term loan was disbursed before the letter of guarantee was executed, from the terms of the letter of guarantee there is good consideration in this case. Section 80, illustration (c), therefore, does not apply to the present case because the situation here is different from that envisaged in illustration (c).

I shall now consider the next point, namely the contention that there was a variation in the terms of the agreement.

I do not think that there is any merit in this contention. In Clause 5 of the letter of guarantee, the second and third defendants expressly agreed that the plaintiff may vary the terms of the loan agreement. Clause 5 states:

> You may, as you think fit and without reference to me/us, grant the principal time or other indulgence or make or accept any arrangement or composition with him in respect of any indebtedness hereby guaranteed and also **vary,** renew, release, realize or in any way deal with any securities or rights now or hereafter held by you in respect of the indebtedness. [Emphasis added]

In *Citibank N.A. v. Ooi Boon Leong* [1981] 1 MLJ 282, the Federal Court held:

> in any event the contract of guarantee in this case contained express provisions giving the bank the right to do or omit to do certain things without thereby prejudicing the rights against the respondents. As the respondents had agreed to waive any variation or alteration and the bank had proceeded with the performance of the contract, on that basis it would be inequitable to allow them to resile from the contract ...

For the reasons stated above, I dismiss the appeal with costs.

Also found at [1991] 3 CLJ 1849